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YAYASAN BUMIPUTERA SABAH & ANOR

v.

APOVIEW WOOD PRODUCTS SDN BHD

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COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
AZHAR MA'AH JCA
ABD AZIZ ABDUL RAHIM JCA
[CIVIL APPEAL NO: S-02-1727-2009]

C

14 MAY 2012

COMPANY LAW: *Winding-up - Locus standi - Receiver and manager - Appointment of receiver and manager pursuant to Debenture - Whether receiver and manager could represent respondent upon winding-up -*

D

Whether powers of receiver and manager over charged assets and to institute action continued after winding-up - Whether retained possessory rights over charged assets

E

The respondent/plaintiff applied to the bank for loan facilities in the forms of overdraft facility, export credit refinancing (pre-shipment) facility and export credit refinancing (post-shipment) facility and executed a Debenture dated 17 June 1998 for the purpose. However, the respondent defaulted and the bank appointed a receiver and manager. A suit was commenced in the name of the

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respondent by the receiver and manager as the agent of the respondent in respect of an action for conversion of machines by the appellant in November 2003 and obtained a summary judgment against the appellants. Meanwhile, on an application of other creditors, a winding-up order was entered against the

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respondent on 19 September 2008. The appellant therefore raised the objection as to the *locus standi* or right of the receiver and manager to represent the respondent upon the respondent's winding-up. At the material times of the appellants' objection, the only pending matter was the assessment of damages arising from

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the act of conversion of the said machines by the appellants. The appellants' objection was dismissed by the learned Deputy Registrar and was also dismissed on further appeal by the High Court. The issue before this court was whether, in the light of the winding-up order entered against the respondent, the receiver and

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manager had the *locus standi* or right to continue representing the respondent in the present action, at the stage of assessment of damages after judgment had been earlier obtained by the respondent.

Held (dismissing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The winding-up legislation deprives the receiver and manager of any power "to carry on the business" of the company as its agent so as to create debts as against its unencumbered assets. However, to go further and hold that the receiver and manager's general agency is terminated "for all purposes" by the winding-up is unwarranted and was not supported by the provisions of law. (para 22)

(2) A "receiver" is a person appointed under the terms of a Debenture or by the court to realise the assets charged and apply the proceeds for the benefit of those entitled. The receiver and manager, in the present case, were duly appointed pursuant to the Debenture and hence, the powers of the receiver and manager over the charged assets and the power to institute action in the company's name continued after the winding-up. (paras 12, 20 & 24)

(3) On the facts, the bank was a secured creditor with the security as stated in the Debenture, *inter alia*, being the first fixed charges and floating charges. The bank as secured creditor of the respondent could operate outside the liquidation upon winding-up of the respondent and its security as found in the Debenture could be enforced independently of the liquidation process. (para 25)

(4) The receiver and manager and the court appointed liquidator in winding-up can exist side by side and each exercised separate duties and powers by the Companies Act 1965, in particular s. 236 and the Debenture. *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* (refd). (paras 26-28)

(5) A winding-up of a company after the appointment of the receiver and manager terminates his purely personal powers but not his *in rem* power *ie*, they continue to retain

possessory rights conferred by the Debenture to take custody and control of all assets charged under the Debenture. In this light, the respondent's right to the machineries did not disappear when they were wrongfully disposed of to a third party. The respondent instead of getting the machineries back had successfully obtained a judgment which was held to be a "property" within the provisions of art. 13 of the Federal Constitution by the Federal Court in the case of *Minister of Finance; Government of Sabah v. Petrojasa Sdn Bhd*. (paras 29-32)

(6) In the circumstances, the receiver and manager had the necessary *locus standi* and rights to represent the respondent in the High Court. However, the powers did not include powers to run the respondent's business as a going concern *ie*, incurring debts. Such powers to run the business of the respondent as a going concern and ultimately to incur debts should be left to the court appointed liquidators in the winding-up. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Responden/plaintif memohon kemudahan pinjaman bank dalam bentuk kemudahan overdraf, kemudahan pembiayaan semula kredit export (pra-penghantaran) dan kemudahan pembiayaan semula kredit export (post-penghantaran) dan menandatangani Debentur bertarikh 17 Jun 1998 bagi tujuan tersebut. Walau bagaimanapun, responden ingkar dan bank melantik penerima dan pengurus. Suatu guaman dimulakan atas nama responden oleh penerima dan pengurus sebagai agen responden berkaitan dengan tindakan bagi pemindahan mesin oleh perayu dalam bulan November 2003 dan memperoleh penghakiman terus terhadap perayu-perayu. Sementara itu, atas permohonan pemiutang-pemiutang lain, suatu perintah penggulungan dimasukkan terhadap responden pada 19 September 2008. Perayu, oleh demikian, membangkitkan bantahan berkaitan *locus standi* atau hak penerima dan pengurus untuk mewakili responden atas penggulungan responden. Pada masa material bantahan perayu-perayu dibuat, satu-satunya perkara yang masih tinggal untuk diputuskan adalah pentaksiran ganti rugi yang berbangkit daripada tindakan pemindahan mesin-mesin tersebut oleh perayu-perayu. Bantahan perayu-perayu ditolak oleh Timbalan Pendaftar yang bijaksana dan juga ditolak atas rayuan selanjutnya

kepada Mahkamah Tinggi. Isu di hadapan mahkamah adalah, sama ada, berikutan perintah penggulungan yang dimasukkan terhadap responden, penerima dan pengurus mempunyai *locus standi* untuk terus mewakili responden di dalam tindakan ini, pada peringkat pentaksiran ganti rugi selepas penghakiman telah terlebih dahulu diperoleh oleh responden.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Perundangan penggulungan menafikan penerima dan pengurus sebarang kuasa "untuk menjalankan perniagaan" syarikat sebagai agennya sehingga membentuk hutang terhadap aset-aset tak dihalangnya. Walau bagaimanapun, untuk memutuskan selanjutnya bahawa agensi am penerima dan pengurus dibatalkan "bagi kesemua tujuan" atas penggulungan adalah tidak wajar dan tidak disokong oleh peruntukan undang-undang.

(2) Seorang "penerima" adalah orang yang dilantik di bawah terma Debentur atau oleh mahkamah untuk merealisasikan aset-aset yang dicagar dan menggunakan hasilnya untuk faedah mereka yang berhak. Penerima dan pengurus, di dalam kes ini, dilantik sewajarnya menurut Debentur dan dengan itu, kuasa penerima dan pengurus terhadap aset-aset yang dicagar dan kuasa untuk memulakan tindakan atas nama syarikat berterusan selepas penggulungan.

(3) Di atas fakta, bank tersebut adalah pemiutang bercagar dengan cagaran seperti yang dinyatakan di dalam Debentur, antara lain, cagaran tetap dan cagaran terapung. Bank sebagai pemiutang bercagar responden boleh beroperasi di luar likuidasi selepas penggulungan responden dan cagarannya seperti yang didapati dalam Debentur boleh dikuatkuasakan secara berasingan dalam proses likuidasi.

(4) Penerima dan pengurus dan pelikuidasi yang dilantik mahkamah dalam penggulungan boleh wujud bersama dan setiap satu melaksanakan kewajipan dan kuasa yang berbeza di bawah Akta Syarikat 1965, khususnya s. 236 dan Debentur. *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* (dirujuk).

(5) Penggulungan sesebuah syarikat selepas perlantikan penerima dan pengurus membatalkan kuasa peribadinya tetapi bukan kuasa *in rem* iaitu mereka berterusan mengekalkan hak milikan yang diberikan oleh Debentur untuk mengambil kawalan dan jagaan kesemua aset yang dicagarkan di bawah Debentur. Berikutan ini, hak responden terhadap mesin-mesin tersebut tidak hilang apabila ia dilupuskan secara salah kepada pihak ketiga. Responden di sebalik memperoleh semula mesin-mesin tersebut telah berjaya memperoleh penghakiman yang diputuskan sebagai "harta" dalam rangkuman peruntukan per. 13 Perlembagaan Persekutuan oleh Mahkamah Persekutuan di dalam kes *Minister of Finance; Government of Sabah v. Petrojasa Sdn Bhd*.

(6) Dalam hal keadaan tersebut, penerima dan pengurus mempunyai *locus standi* dan hak yang diperlukan untuk mewakili responden di Mahkamah Tinggi. Walau bagaimanapun, kuasa tersebut tidak termasuk kuasa untuk menjalankan perniagaan responden sehingga menanggung hutang. Kuasa untuk menjalankan perniagaan responden secara berterusan dan akhirnya menanggung hutang perlu dibiarkan kepada pelikuidasi yang dilantik mahkamah dalam penggulungan.

Case(s) referred to:

Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)) [1995] 3 CLJ 316 SC ***(refd)***

Gosling v. Gaskell [1897] AC 575 ***(refd)***

Gough's Garages v. Pugsley [1930] 1 KB 615 ***(refd)***

Henry Pound, Son & Hutchins [1889] 42 Ch D 402 ***(refd)***

K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputera Malaysia Bhd & Ors [1997] 3 CLJ 274 ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Re Landmark Corp [1968] 88 WN (NSW) Pt 1 194 ***(refd)***

Re Manchester and Milford, Ry LJ Ch 369 ***(refd)***

Sowman v. David Samuel's Trust [1978] 1 KB 615 ***(refd)***

Strong v. Carlisle Press [1893] 1 Ch 268 ***(refd)***

United Malayan Banking Corporation Bhd v. Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation & Anor) [1985] 1 LNS 162 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 236
Federal Constitution, art. 13

Other source(s) referred to:
Saheran Suhendran Abdullah, Lim Tian Huat & Edwin Chew, *Corporate Receivership - The Law and Practice in Malaysia and Singapore*, 1997, pp 110-111

For the appellants - Chung Jiun Dau; M/s Chung & Assocs
For the respondent - Celestina Stuel Galid; M/s Jayasuriya Kah & Co

[Appeal from High Court, Kota Kinabalu; Civil Suit No: K22-23-2005]

Reported by Emm Zehra

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the appellants (defendants) against the decision of the learned High Court judge dated 17 July 2009 in upholding the decision given by the learned deputy registrar dated 13 March 2009 who held that the receiver and manager appointed under a debenture had the right to represent the respondent (plaintiff) in the action despite the entry of a winding-up order made against the respondent (plaintiff).

Factual Background

[2] The respondent (plaintiff) – Apoview Wood Products Sdn Bhd (In Liquidation) had applied to the bank for loan facilities in the principal sum of RM4,500,000 in the forms of an overdraft facility, export credit refinancing (ECR) (Pre-shipment) facility and export credit refinancing (ECR) (Post-shipment) facility. For that purpose a debenture dated 17 June 1998 was duly executed by the parties.

[3] The respondent is a company *inter alia* carrying on business or trade as manufacturers, processors, assemblers, agents, importers and exporters, wholesale and retail of all kinds of wood products, convert and prepare for market timber, logs, wood and all other similar produce of every kind and description and to buy, sell, barter, exchange or otherwise deal in the same.

[4] When the respondent defaulted, the bank appointed a receiver and manager on 12 April 2004. This suit was commenced by filing the writ of summon and the statement of claim in the name of the respondent by the receiver and manager as agent of the respondent on 5 February 2005 in respect of an action for conversion of machines which took place in November 2003. On 28 May 2005 the respondent applied for a summary judgment against the appellants and on 15 August 2005 the High Court heard and allowed the summary judgment.

[5] In the meantime, on 19 September 2008 a winding-up order was entered against the respondent, on application of other creditors. On 13 September 2009, the appellant raised on objection as to the *locus standi* or right of the receiver and manager to represent the respondent in the action after the respondent was wound-up. The learned deputy registrar found in favour of the receiver and manager and dismissed the appellants' objection. The appellants appealed to the High Court judge-in-chambers against the said decision of the learned deputy registrar. On 17 July 2009 the learned High Court judge dismissed the appellants appeal. The only pending matter at the material times of the appellants' objection was the assessment of damages arising from the act of conversion of the said machines by the appellants.

[6] In other words, the respondent (acting through the receivers and managers) had succeeded in the High Court and Court of Appeal resulting in a court order awarding damages in favour of the respondent to be assessed as the machineries had been wrongfully disposed of by the appellants to a third party.

The Appellants' Contentions

[7] Learned counsel for the appellants, Mr Chung Juin Dau contended that as from 19 September 2008 when the winding-up order was entered against the respondent, the receiver and manager were no longer agents of the respondent; and therefore cannot represent the respondent once the winding-up order was entered. Learned counsel further contended that the cause of action in the suit belongs to the respondent and is not something

which the receiver and manager can exercise possessory right over the choses in action or things in action in respect of the said machines and therefore they do not have the powers to continue the action as agents of the respondent after the winding-up. Learned counsel expressed his stand that once a liquidator is appointed pursuant to a winding-up order a receiver and manager lose his status as agents of the respondent company.

The Respondent's Contentions

[8] Learned counsel for the respondent, Ms Celestina Stuel Galid, submitted that the receiver and manager in the present case were appointed pursuant to a debenture dated 17 June 1998; and the said machines (two units of CNC router machines) which were converted by the appellants were part of the movable assets charged under the Second Schedule of the debenture. The powers of the receiver and manager under the debenture, expressly include the power to "bring take defend discontinue any actions suits and proceedings." Learned counsel concluded that notwithstanding the winding-up the receiver and manager were empowered under the debenture to continue the action, namely for assessment of damages based on a summary judgment which had been duly granted by the court on 15 August 2005; and had never been set aside.

[9] Learned counsel also submitted that the receiver and manager and the court appointed liquidator can exist side by side; and each exercising separate duties and powers conferred by the Companies Act 1965 and the Debenture.

Decision Of The High Court

[10] The learned High Court judge found in favour of the respondent and dismissed the appeal by the appellants. His Lordship agreed with the views of learned counsel for the respondent that the receiver and manager retain possessory powers over the charged assets despite the appointment of a liquidator in a winding-up; and the powers of the receiver and manager are curtailed only in respect of running the respondent as a going concern ie, incurring debts. The learned judge affirmed the decision of the learned Deputy Registrar who held that the receiver and manager appointed under the debenture in the present case had the right to represent the respondent in this action despite the entry of the winding-up order against the respondent.

Decision Of This Court

[11] The issue before us is quite straight forward ie, whether in the light of the winding-up order entered against the respondent company, the receiver and manager have *locus standi* or right to continue representing the respondent company in this present action, at the stage of assessment of damages after judgment had been earlier obtained by the respondent (through the receiver and manager acting as its agents).

[12] In the present case, the receiver and manager were duly appointed pursuant to the debenture dated 17 June 1998. Under s. 5.01(c) of the said debenture, the bank may appoint any persons to be receiver and manager of the properties and assets thereby charged and may in the like manner from time to time remove any receiver or manager so appointed and appoint another or others in his stead.

[13] The properties and assets charged under the debenture are listed under First, Second and Third Schedules to s. 2.01 of the debenture. In the First Schedule, the properties or assets charged by way of first fixed charge was over the respondent's land held under CL 02533976 situated in the district of Papar erected thereon a wood and rattan processing and fabrication facility comprising:

(a) one 3-Storey Office Block;

(b) one Semi-Open sided Postal Frame Warehouse;

(c) one Linked-Posted Frame Structure Accommodating the Wood Processing Factory/Production Area/Treatment Area; and

(d) A 22' Wide 'Pre-Mixed' Carriageway giving access to all areas/ Perimeter of the site together with covered and uncovered Car Parking Bays, Lorry Parking Bays and Lay-Bays.

[14] In the Second Schedule, the properties or assets charged by way of a first fixed charge were all the respondent's factory including all its plants, machinery, equipment, motor vehicles, furniture and fittings and other fixed assets both present and future whatsoever on CL 025339753 situated in the district of Papar and wheresoever's situated excluding machineries, equipment and other assets under hire purchase.

[15] In the Third Schedule, the properties or assets charged by way of a first floating charge were the respondent's undertaking properties and assets (other than those referred to in Second Schedule above) movable or immovable wheresoever's situated both present and future including but not limited to its uncalled capital, goodwill, all stocks-in-trade, semi-finished products and raw materials, book departments and accounts, bonds and notes both present and future.

[16] Under s. 5.01(d) of the debenture the bank as well as the receiver and manager are empowered "to seize any properties or assets hereby secured and to effect a proper and valid sale or disposition thereof on such terms and for such consideration as the bank or such authorised person shall think for with liberty to buy or resell the same".

[17] The powers of the receiver and manager are outlined precisely under s. 5.03 of the debenture. They *inter alia* include:

(a) to take possession of and get in all or any of the assets of the borrower hereby charged;

(b) to carry or concur in carrying on the business of the borrower as agents of the borrower;

(c) raise and borrow money on the security of any or all of the borrower's assets and properties upon such terms as he or they shall think fit;

(d) to sell or concur in selling any of the assets hereby charged. In exercising the power of sale hereby conferred the receiver and or manager may sell at such time and in such manner at such price as he or they may in his or their absolute discretion think fit and in exercising such discretion he or they may have in regard to have views and desires of the bank. The receiver and or managers shall not be accountable for any loss or damage which may be suffered by the borrower by reason of the exercise of such discretion;

(e) to make any arrangement or compromise which he or they may think fit, bring take defend discontinue any actions suits or proceedings whatsoever, civil or criminal in relation to the assets charged hereunder;

(f) to do all such other reasonable acts and things as may be considered to be incidental to or conducive to any of the matters or powers aforesaid and which he or they lawfully may or can do as agent of the borrower; and

(g) to perfect, complete and register any security documents.

[18] Section 5.03(e) of the debenture clearly provides for the powers for the receiver and manager to "bring take defend discontinue any actions suits or proceedings whatsoever, civil or criminal in relation to the assets charged" under the debenture.

[19] Section 5.04 of the debenture also provides:

> The Borrower (Respondent) hereby irrevocably appoints the Bank to be its attorney and in its name and on its behalf to do execute any deed assurance or act which may be required or may be deemed proper on any sale or disposition by the Bank or by any Receiver and or Manager as aforesaid of any properties or assets of the Borrower under any power of sale or other disposition applicable thereto and also to do and execute all such other deeds assurance or acts as the attorney shall deem expedient in the premises. The Bank shall have the power to receive and to give good receipts for the proceeds of the sale.

[20] "Receiver" is a person appointed under the terms of a debenture or by the court to realise assets charged and apply the proceeds for the benefit of those entitled. In *Re Manchester and Milford*, Ry LJ Ch 369, Jessel MR in distinguishing a 'receiver' and 'manager' in the technical sense observed:

> A receiver means a person who receives rents or other income of property but he does not manage the property in the sense of buying and selling or anything of that kind. The Receiver merely takes the income and pays necessary outgoings; the manager carries on the trade or business.

[21] The proposition that the agency of the receiver and manager is terminated on the winding-up of a company (as contended by the appellants in the present appeal ought to be carefully examined.

[22] Lord Halsbury in the case of *Gosling v. Gaskell* [1897] AC 575 at p. 583 was of the view that on the winding-up of the company, the authority of the receiver and manager to carry on

the business of the company is terminated by operation of law; the winding-up legislation only allows the business of the company to be carried on by the liquidator for the purpose of the winding-up and any contracts entered into by the receiver and manager in the ordinary course of business will not bind the company. The winding-up legislation (as found in the Companies Act 1965) deprives the receiver and manager of any power to carry on the business of the company as its agent so as to create debts as against its unencumbered assets. But to go further and hold that the receiver and manager general agency is terminated for all purposes by the winding-up is unwarranted and supported by no provisions of law.

[23] The learned authors of the *Corporate Receivership - The Law and Practice in Malaysia and Singapore*, 1997 by Saheran Suhendran bin Abdullah, Lim Tian Huat and Edwin Chew at pp. 110-111 states:

> It is submitted that the true effect of winding-up is as stated by Rigby LJ in the Court of Appeal. His Lordship's finding is limited only to the proposition that the winding-up legislation deprives the receiver of any power to carry on the business of the company as its agent so as to create debts as against its unencumbered assets. His Lordship went no further. Accordingly, it is submitted that the true effect of this statutory prohibition is only to limit the receiver's agency and powers by depriving the receiver of the power to create debts against the unencumbered assets of the company.
>
> It is noted that the above represents the only statutory prohibition that imposes a limitation on the receiver's powers. In the absence of any other principle of law that would cause the termination of the receiver's agency for all purposes, the receiver's other irrevocable powers which would ordinarily survive the winding-up and his general agency, to the extent to which it is unaffected by the statutory prohibition, should therefore survive.

[24] It is generally accepted that the receiver and manager powers over the charged assets and the power to institute actions in the company's name continue after winding-up (see: *Sowman v. David Samuel's Trust* [1978] 1 KB 615; *Gough's Garages v. Pugsley* [1930] 1 KB 615; and *United Malayan Banking Corporation Bhd v. Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation & Anor)* [1985] 1 LNS 162).

[25] The bank in the present case is a secured creditor with the security as stated in the debenture, *inter alia* being the first fixed charges and floating charges. Thus the bank as secured creditor of the respondent company can operate outside the liquidation upon winding-up of the respondent company and its security as found in the debenture can be enforced independently of the liquidation process. (see: *Henry Pound, Son & Hutchins* [1889] 42 Ch D 402; *Strong v. Carlisle Press* [1893] 1 Ch 268; *Re Landmark Corp* [1968] 88 WN (NSW) Pt 1 194; *Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation))* [1995] 3 CLJ 316). Generally the rights of the security and the security itself are unaffected by the winding-up and powers ought to be unaffected by the winding-up so as to allow the bank (through the receiver and manager to realise the security outside the liquidation).

[26] We are in agreement with the submissions of learned counsel for the respondent that the receiver and manager and the court appointed liquidator in the winding-up can exist side by side and each exercising separate duties and powers by the Companies Act 1965 (particularly s. 236) and the debenture in question. On this point, we are in agreement with the learned authors of the book *"Corporate Receivership – The Law and Practice in Malaysia and Singapore"* at p. 111:

> the liquidator's statutory agency which is created by the winding-up legislation is not so inconsistent with the receiver's agency so as to cause the termination of the receiver's agency for all purposes. The liquidator's statutory agency exists primarily in relation to the unencumbered assets for the benefit of the unsecured creditor which explains why the winding-up revokes the receiver's power to create debts as against the unencumbered assets. However, the liquidator is unable to exercise his statutory powers over charged assets to the exclusion of the secured creditor. Similarly, any receiver appointed for the secured creditor's benefit should remain unaffected by the liquidator's agency save, of course, for his power to create debts as against the unencumbered assets of the company which power is divested by statutory intervention.

[27] The Federal Court in the case of *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* [2005] 1 CLJ 793 held:

On appointment, a receiver and manager becomes an agent of the company and that agency ceases upon the winding-up of the company. Nevertheless, he still retains his possessory right to the charged assets and his status is best described by Edgar Joseph Jr. FCJ in the case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputera Malaysia Bhd & Ors* [1997] 3 CLJ 274 ("Kimlin") to be as follows:

> To put it another way, winding-up after a receiver and manager is appointed terminates his purely personel powers but not his *in rem* powers.
>
> The distinction between a receiver's and manager's *in rem* powers and his personel powers is this: the former flow from the security created by the debenture and relate to the assets of the company whereas the latter relate to everything else. So, for example, in *Sowman v. David Samuel Trusts Ltd* [1978] 1 All ER 616, a receiver appointed over assets which included a mortgage debt could validly exercise the power of sale in the name of the company despite its liquidation. This power, being coupled with an interest, was irrevocable both at common law and by statute and accordingly, a power given to the receiver for the purpose of securing a benefit to the debenture holders was irrevocable as a power given to the debenture holders themselves. It was further held that the sale did not contravene s. 227 of the Companies Act 1948 (equivalent to the Malaysian s. 223) since although made in the name of the company, it was a sale of property which did not belong to the company but formed part of the debenture holder's security.

[28] At p. 810 of the said case *(K Balasubramaniam)*, Siti Norma Yaakob FCJ said:

> In practice the liquidator exists side by side with the receiver with each exercising his separate powers and duties conferred on them by the Act in the case of the former and by the debenture in the case of the latter. There is no question of any ranking or of one being superior to the other or of one taking precedence of the other and as explained by Needham J in *Expo International Pty Ltd & Anor v. Chant & Ors* [1979] 3 ACLR 888, "a receiver, while he has a prior right to possession of the assets subject to the charge given to the person who appointed him over the right of the liquidator, nevertheless has possession for a limited purpose, namely, to comply with his duties to account to the mortgagee."

[29] It is almost settled that a winding-up of a company after receiver and manager are appointed terminates his purely personal powers but not his *in rem* power. The difference between the two has been explained by Edger Joseph Jr FCJ in the case of *Kimlin Housing Development Sdn Bhd (supra)* ie, they continue to retain possessory rights conferred by the debenture to take custody and control of all assets charged under the debenture.

[30] In the present case, it is not in dispute that the assets in question ie, the two units of CNC Router Machines (the subject matter of the present action) were part of the movable assets charged under the Second Schedule of the debenture by way of a first fixed charge. It is also not in dispute that the receiver and manager as the agent of the respondent under s. 5.03(a) of the debenture are empowered "to take possession of and get in all or any of the assets of the borrower (the respondent) hereby charged". It is also not in dispute that s. 5.03(e) of the same debenture allows the receiver and manager "to make arrangement or compromise which they may think fit, bring take defend discontinue any actions suits or proceedings whatsoever, civil or criminal in relation to the assets charged hereunder." It must also be noted that at the material time when the *locus standi* of the receiver and manager was challenged by the appellants, the respondent had already obtained a judgment in its favour against the appellants in relation to the charged assets and they were only at the stage of assessment of damages before the learned Deputy Registrar.

[31] The respondent's right to the said machineries do not disappear when they were wrongfully disposed of to a third party. The respondent instead of getting the machineries back has successfully obtained a judgment ordering damages to be assessed by the learned deputy registrar. A judgment of this nature has been held by the Federal Court in the case of *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321, to be a "property" within the provisions of art. 13 of the Federal Constitution, Abdul Hamid Mohamad CJ (as he then was) said:

> Para 1 of the Schedule of the CJA itself provides that mandamus may be issued "for the enforcement of rights conferred by Part II of the Constitution, or any of them ... ... "
> Article 13 which is the last article in Part II of the Constitution provides:

> (1) No person shall be deprived of property save in accordance with law.
>
> In other words, *mandamus* may issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance with law. Here, the Respondent has obtained a judgment. There is a judgment debt owed to him. Payment has not been made. Upon obtaining the certificate, it becomes a statutory duty of the State Government of Sabah to make payment. By not paying, clearly the State Government of Sabah has deprived the Respondent of its property contrary to law.

[32] On this point, we agree with the learned High Court judge that "hence the judgment of the plaintiff (respondent) in my view is notionally the machineries and the receiver and manager retain their possessory rights over the machineries, though in a form of a judgment and with it the right to pursue this claim". It does not matter whether the said wrongful conversion of the machineries was committed by the appellants long before the appointment of the receiver and manager on 12 April 2004.

Conclusion

[33] Based on the above consideration, our answer to the issue before us is this: that the receiver and manager in the present case have the necessary *locus standi* and rights to represent the respondent in the High Court in the present action dispute the entry of the winding-up order against the respondent. This is because the receiver and manager retain their possessory powers over the charged assets (the two units of machineries). However, it must be added that such powers do not include powers to run the respondent's business as a going concern ie, incurring debts. Such powers to run the business of the respondent as a going concern and ultimately to incur debts should be left to the court appointed liquidators in the winding-up.

[34] On the above findings we unanimously dismiss the appeal with costs of RM10,000 to the respondent. We also make an order that the deposit be paid to the respondent on account of fixed costs.